TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~710~~ 70

ALBERT L. TROP, PETITIONER,

vs.

JOHN FOSTER DULLES, SECRETARY OF STATE OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 24, 1957

CERTIORARI GRANTED MARCH 4, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 710

ALBERT L. TROP, PETITIONER,

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INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Second Circuit	1	1
Appendix to Appellant's brief consisting of proceedings in United States District Court for the Eastern District of New York	1	1
Statement under Rule 15(b)	1	1
Plaintiff's motion for summary judgment	2	1
Affidavit of Albert L. Trop	3	2
Exhibit A—Summary of record of Court Martial	5	4
Opinions, Inch, J.	6	5
Judgment	7	5
Appendix to Appellee's brief consisting of one paper filed in United States District Court for the Eastern District of New York	9	7
Court martial order certified January 12, 1956	9	7
Opinion, Hand, J.	14	10
Dissenting opinion, Clark, J.	18	13
Judgment	19	14
Clerk's certificate (omitted in printing)	21	
Order allowing certiorari	22	15

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—4405-7

[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Civ. No. 16144

ALBERT L. TROP, Plaintiff-Appellant,

against

JOHN FOSTER DULLES, as Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE, Defendants-Appellees

Appendix to Appellant's Brief

STATEMENT UNDER RULE 15(b)

This action was commenced by the filing of the complaint on December 29, 1955. Both parties moved for summary judgment. Judge Inch granted defendant's motion and denied plaintiff's. Judgment was entered on May 31, 1956.

[fol. 2] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—March 16, 1956

Sir:

Please take notice that plaintiff, on the pleadings herein and on his affidavit sworn to March 16, 1956, will move this Court, at a Motion Part thereof, to be held in the United States Courthouse, in the Post Office Building, Borough of Brooklyn, City of New York, on April 4th, 1956, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for summary judgment in plaintiff's favor declaring that he has not lost his United States citizenship, and for such other and further relief as to the Court may seem just and proper.

Dated: March 16, 1956.

Yours, etc., Osmond K. Fraenkel, Attorney for Plaintiff, Office & P. O. Address, 120 Broadway, New York 5, N. Y.

To: Leonard P. Moore, Esq., United States Attorney, Eastern District of New York, Attorney for Defendants, 271 Washington Street, Brooklyn 1, N. Y.

[fol. 3] In United States District Court, Eastern District of New York

Affidavit of Albert L. Trop in Support of Motion

State of New York,
County of New York, ss:

Albert L. Trop, being duly sworn, deposes and says:

I am the plaintiff herein. This action is brought under § 1503, Title 8, United States Code, for a declaratory judgment with regard to my United States citizenship.

I am a native born citizen and was born in Akron, Ohio, on February 7, 1924. For several years past I have been and still am residing with my wife at 65 Lincoln Blvd., Long Beach, Nassau County, State of New York, which is within the jurisdiction of this Court. I have been for some years employed by an aviation concern. The complaint alleges and it is admitted that in 1952 I applied for a passport which was refused on the ground that I had lost my American citizenship and that this claim by the Department of State rested on a court martial and dishonorable discharge from the United States Army on the ground of desertion in time of war. The Department of State claims that this conviction resulted in a loss of my native born citizenship by reason of § 401(g) of the Nationality Act of 1940, which is now § 1481(8) of Title 8 of the United States Code.

At no time did I intend to expatriate myself or become a national of any other country than the United States. I have always considered myself an American citizen owing allegiance to the United States and to no other country. I [fol. 4] have not become a foreign national, nor have I ever intended to do so. At no time did I attempt to have any contact with any enemy of the United States or to desert to any enemy of the United States or to any foreign country,

and no claim was made in the court martial proceedings that I had done so.

The occurrence which formed the basis of my conviction arose in Casablanca in May 1944, when I was 20 years old. While confined there for an earlier breach of discipline, I found the conditions so intolerable that in desperation I escaped, but the next day I surrendered. I made no attempt to leave the area under control of American troops and did not even try to reach the Spanish-Moroccan border although I was within 30 miles of it. A summary of the court martial proceedings is annexed and marked Exhibit A.

It is my contention that if the statute relied upon by the State Department is applied to my case the same is unconstitutional as in excess of the power of Congress to deal with native-born citizens.

As appears in the accompanying brief, this contention rests upon the constitutional principle that Congress has no power to take away the nationality of native born citizens, except where they have actually become nationals of other countries or by their own act indicated an intention to become such foreign nationals. Whatever application this statute might constitutionally have to the case of a native born American who actually deserted to the enemy in time of war, I submit that it can have no constitutional application to my own case.

I therefore respectfully request the Court to grant summary judgment declaring the act in question unconstitutional either on its face or as applied.

Albert L. Trop.

(Sworn to March 16, 1956.)

[fol. 5] EXHIBIT A, ANNEXED TO AFFIDAVIT OF ALBERT L. TROP

SUMMARY OF RECORD OF COURT MARTIAL

(Special Order No. 134 Held June 7, 1944 at Casablanca.)

Charge I

Specification 1: Escape on May 9, 1944 (p. 10).
Specification 2: Escape on May 22, 1944 (p. 10).

Charge II

Specification: Absence for 3 hours on May 9, 1944 (p. 11).

Charge III

Specification: Desertion from May 22 to May 23, 1944 (p. 11).

The testimony with reference to Charge III (which alone is relevant here) commences at p. 59.

First Lieut. Derr testified that on May 23rd he was in a truck going from Meknes to Rabat and saw plaintiff who *h*old him he was from the hospital and he and a companion boarded the truck and were turned over to the military police in Rabat (p. 61). They got in without any argument and made no attempt to leave the truck (p. 62).

Technical Sergeant Helen L. Cochran testified that she was in the truck (p. 73), that plaintiff and another "willingly got in the truck although nothing was said;" (p. 74), and that they were walking in the direction of Rabat (p. 75). [This is in the direction of Casablanca and away from Spanish Morocco.]

Plaintiff himself said: "My organization is now in Italy. I thought it would be possible for me to rejoin my organization, and there I might get a Brigade Commander that would reopen my case. At the time that Lieutenant Derr picked us up we had decided to return to the stockade. The going was tough. We had no money to speak of, and at the time we were on foot and we were getting cold and hungry" (p. 76).

[fol. 6] IN UNITED STATES DISTRICT COURT

OPINIONS—May 22, 1956

Motion by plaintiff for summary judgment declaring that he has not lost his United States citizenship. Although the papers herein show that there is no genuine issue as to any material fact, they do not show that plaintiff is entitled to a judgment as a matter of law. Therefore, this motion must be and hereby is denied. Settle order.
May 22, 1956.

Robert A. Inch, Chief Judge, U. S. D. C.

Motion by defendants for summary judgment dismissing the complaint, wherein plaintiff asks for judgment declaring that he has not lost his United States citizenship.

The papers herein show that there is no genuine issue as to any material fact and that plaintiff has lost his United States citizenship by being convicted by court martial of deserting the U. S. military forces in time of war and, as a result thereof dishonorably discharged from the service of such military forces, the defendants are entitled to a judgment as a matter of law. Therefore, this motion must be and hereby is granted. Settle order.
May 22, 1956.

Robert A. Inch, Chief Judge, U. S. D. C.

[fol. 7] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

JUDGMENT—Entered May 31, 1956

At Brooklyn, New York, in said District on the 31st day of May, 1956.

The plaintiff having moved this Court by notice of motion dated March 16, 1956 for summary judgment declaring that he has not lost his United States citizenship, and defendants having cross moved by notice of motion dated April 25, 1956 for an order granting summary judgment dismissing the complaint, and plaintiff having appeared by Osmond K. Fraenkel, Esq., in support of the motion and

in opposition to the cross motion and defendants having appeared by Leonard P. Moore, United States Attorney for the Eastern District of New York, Margaret E. Millus, Assistant United States Attorney, of counsel, in opposition to the motion and in support of the cross motion, and upon reading the affidavit of Albert L. Trop, sworn to the 16th day of March, 1956, in support of the motion, and the affidavit of Margaret E. Millus, sworn to the 25th day of April, 1956, in support of the cross motion, and upon all the papers filed and proceedings heretofore had herein and due deliberation having been had thereon, and upon filing the decisions of the Court

Now, on motion of Leonard P. Moore, United States Attorney for the Eastern District of New York, attorney for the defendant, it is

[fol. 8] ORDERED that the plaintiff's motion for summary judgment declaring that he has not lost his United States citizenship be and the same hereby is denied, and it is further

ORDERED that the defendant's motion for summary judgment dismissing the complaint be and the same hereby is granted.

Robert A. Inch, U. S. D. J.

Judgment entered

May 31, 1956.

Clerk.

[fol. 8a] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 24184

ALBERT L. TROP, Plaintiff-Appellant,

against

JOHN FOSTER DULLES, as Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE, Defendants-Appellees

Appellees' Appendix

[fol. 9] IN UNITED STATES DISTRICT COURT

COURT MARTIAL ORDER CERTIFIED JANUARY 12, 1956, SETTING FORTH APPELLANT'S CONVICTION BY COURT MARTIAL ON JUNE 13, 1944 FOR DESERTING THE SERVICE OF THE UNITED STATES DURING TIME OF WAR

United States of America

Department of the Army

Washington, 12 January, 1956.

I hereby certify that the attached document pertaining to the General Court-Martial of General Prisoner Albert L. Trop (formerly Private, 19028254, Hq. & Hq. Btry, 18th F. A. Brigade) is a true and correct copy of general Court-Martial Orders No. 191, Headquarters Atlantic Base Section APO 759, dated 13 June 1944, which is on file in the Office of The Judge Advocate General Department of the Army, Washington 25, D. C.

Eugene M. Caffey, Major General, USA, The Judge Advocate General.

I hereby certify that Major General Eugene M. Caffey, who signed the foregoing certificate is The Judge Advocate General of the Army, and as such has the legal custody of the records herein described, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Wilbur M. Brucker Secretary of

the Army, have hereunto caused the seal of the Department [fol. 10] of the Army to be affixed and my name to be subscribed by the Deputy Administrative Assistant of the said Department, at the City of Washington, this 12th day of January, 1956.

Wilber M. Brucker, Secretary of the Army, by James C. Cox, Deputy Administrative Assistant. [Seal.]

General Court-Martial

Orders No. — 191-

Headquarters Atlantic Base Section

A. P. O. 759, 13 June 1944

Before a general court-martial which convened at Casablanca, French Morocco pursuant to paragraph 1, Special Orders No. 134, Headquarters Atlantic Base Section, A. P. O. 759, 7 June 1944, was arraigned and tried:

General Prisoner Albert L. Trop, (formerly Private, 19028254, Hq & Hq Btry, 18th F. A. Brigade).

Charge I: Violation of the 69th Article of War.

Specification 1: In that General Prisoner Albert L. Trop, (formerly Private, Hq & Hq Btry, 18th F. A. Bri- [fol. 11] gade), having been duly placed in confinement in the NATOUSA Disciplinary Training Center on or about 18 March 1944 and having been transferred to Stockade, 50th Station Hospital, Atlantic Base Section, on or about 4 April 1944, did, at or near Casablanca, French Morocco on or about 9 May 1944 escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that General Prisoner Albert L. Trop, (Formerly Private, Hq & Hq Btry, 18th F. A. Brigade), having been duly placed in confinement in Stockade Number Two, Atlantic Base Section, on or about 9 May 1944, did, at or near Casablanca, French Morocco on or about 22 May 1944, escape from said confinement before he was set at liberty by proper authority.

Charge II: Violation of the 61st Article of War.

Specification: In that General Prisoner Albert L. Trop, (formerly Private, Hq & Hq Btry, 18th F. A. Brigade), did, without proper leave, absent himself from his station at Stockade, 50th Station Hospital, Atlantic Base Section, from about 0745 hours 9 May 1944 to about 1030 hours, 9 May 1944.

Charge III: Violation of the 58th Article of War.

Specification: In that General Prisoner Albert L. Trop: (formerly Private, Hq & Hq Btry, 18th F. A. Brigade), [fol. 12] did, at or near Casablanca, French Morocco on or about 22 May 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Moknes, French Morocco on or about 23 May 1944.

Pleas

To specification 1 of Charge I: Not Guilty.

To specification 2 of Charge I: Not Guilty.

To Charge I: Not Guilty.

To the specification of Charge II: Not Guilty.

To Charge II: Not Guilty.

To the specification of Charge III: Not Guilty.

To Charge III: Not Guilty.

Findings

Of all specifications and charges: Guilty.

Sentence

To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three (3) years.

The sentence was adjudged on 9 June 1944.

The sentence, although inadequate, is approved and will be duly executed in order that the accused will not entirely escape punishment, but the execution of that portion thereof [fol. 13] adjudging dishonorable discharge is suspended until the soldier's release from confinement. NATOUSA

Disciplinary Training Center, Oran, Algeria is designated as the place of confinement.

GCMO # 191, 13 June 1944, contd.

By order of Colonel Pugh. William R. Schaefer, Colonel, General Staff Corps, Chief of Staff.

Official: N. W. Clunn, CWO USA, Asst. Adj. Gen.
Distribution: "Special".

[fol. 14] In United States Court of Appeals, for the Second Circuit—October Term, 1956

No. 63

(Argued October 11, 1956)

Docket No. 24184

Albert L. Trop, Plaintiff-Appellant,

v.

John Foster Dulles, as Secretary of State of the United States, and United States Department of State, Defendants-Appellees.

Before: Clark, *Chief Judge*, Hand and Swan, *Circuit Judges*.

On appeal from a judgment of the District Court for the Eastern District of New York (Inch, *Chief Judge*, presiding), summarily dismissing the complaint in an action brought for a judgment declaring that the plaintiff had not lost his "nationality" because of desertion from the United States Army "in time of war."

Osmond K. Fraenkel, for the Appellant.
Margaret E. Millus, for the Appellee.

[fol. 15] Opinion—December 28, 1956

Hand, *Circuit Judge*:

The plaintiff appeals from a judgment, summarily dismissing his complaint in an action under § 1503(a) of Title 8, U. S. Code, for a judgment declaring him to be "a na-

tional of the United States." He is a native citizen, who was serving in 1944 in the United States Army in French Morocco; and the only question is whether he lost his "nationality" because he was convicted by the judgment of a court-martial of desertion "in time of war." The sentence of the court was that he was "to be dishonorably discharged from the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor * * * for three (3) years." Since the judgment of the district court was summary we are to accept as true the statements in the plaintiff's affidavit upon the motion that he had been imprisoned in Casablanca in May 1944 for an earlier breach of discipline, and found the condition so intolerable that in desperation he escaped. The next day he surrendered; and meanwhile he had made no attempt to leave the area under control of American troops. He had had no intention to "expatriate" himself or to become a national of any other country. Nor did he attempt to have any contact with any enemy of the United States, or to desert to any enemy of the United States, or to any foreign country; and no claim was made in the court-martial proceedings that he had done so.

As will appear, we do not find enough doubt of the constitutionality of the statute to resort to any but the natural meaning of the words; *i.e.*, that "in time of war" desertion of any kind results in "expatriation." Indeed, the proviso for possible restoration of "nationality" makes it impossible to suppose that the crime was confined to desertion to the enemy. It was true that at common law no subject could throw off his allegiance, and apparently the sovereign [fol. 16] could not "expatriate" him. However, the Supreme Court, in *Mackenzie* v. *Hare*, 239 U.S. 299, held that the Act of 1907 (34 Stat. 1228) was valid which "expatriated" a woman who married an alien in this country; and that too although she had not intended to surrender her citizenship, and did not suppose that she was doing so. Again, in *Savorgnan* v. *United States*, 338 U.S. 491, a native citizen in 1940 married a citizen of Italy then in this country, and between 1941 and 1945 lived with him in Italy as his wife. She came back to this country on an Italian passport, and the action, like that at bar, was to obtain a judgment recognizing her continued status as a citizen, on the ground that, al-

though she knew that she was being naturalized as an Italian (that being a condition, as her husband told her, of the validity of her marriage), she did not know that she would forfeit her American status, and did not intend to surrender it. Nevertheless the court held that under the Act of 1940 she had done so, because her "place of general abode" between 1941 and 1945 had been Italy (§ 1101(33), Title 8, U.S.C.). See also *Beredin* v. *Acheson*, 194 F. 2d 482 (C.A. 2), certiorari denied 344 U.S. 820.

The important point in both these decisions is, not the especial "objective" facts that the court accepted as the test, but that on both occasions the citizen forfeited her "nationality," not only without supposing that she was doing so, but against her purpose. It is true that the act must not be that of an infant, *Perkins* v. *Elg*, 307 U. S. 325, 334: "Expatriation is the voluntary renunciation of abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking." We will also assume, *arguendo*, that the same is true when the act is under duress;* but when it is voluntary and [fol. 17] the actor is *sui juris*, it is not necessary that he shall be aware that what he does will "expatriate" him, any more than it is in many other situations where the law imposes liability regardless of the actor's knowledge of the legal effects of his act.

There is still another reason why we may not limit the word "desertion" to desertion to an enemy of the United States. Section 1483(a) of Title 8 provides that, except for subsections 7, 8 and 9, none of the acts mentioned in § 1481, shall result in "expatriation" if they occur within the United States, unless they are followed by a "residence outside the United States." Subdivision 7 provides for a "formal written renunciation," subdivision 9 is for treason and subdivision 8 is the one at bar. Thus Congress provided that "in time of war" desertion within the United States should at once and unconditionally result in "expa-

* See *Mandoli* v. *Acheson*, 344 U.S. 133.

triation" if determined by the conviction of a court-martial, and it would be most unreasonable to confine desertions "within the United States" to desertions to an enemy.

We have not considered, and do not consider, whether under the circumstances at bar "expatriation" was, or was not, a "cruel and unusual" punishment under the Eighth Amendment. The plaintiff did not suggest anything of the kind in his complaint, or upon the motion for summary judgment: Judge Inch did not mention it in disposing of the motion, nor did the plaintiff do so in argument. The only part of the brief that by the widest latitude could be considered as so much as a vague intimation of the sort is a passage on page 11; and that did not mention the Amendment, but appears to be a part of the general argument that all involuntary expatriation is a denial of "Due Process of Law."

Judgment affirmed.

[fol. 18] CLARK, *Chief Judge* (dissenting):

I am constrained to disagree with both the substance and the procedural form of the result here reached. Plaintiff-appellant has cited to us and obviously relied on the masterful analysis of expatriation legislation set forth in the Comment, *The Expatriation Act of 1954*, 64 Yale L. J. 1164, 1189-1199. I agree with the author's documented conclusions therein that punitive expatriation of persons with no other nationality constitutes cruel and unusual punishment and is invalid as such. Since I doubt if I can add to the persuasive arguments there made, I shall merely incorporate by reference. In my faith, the American concept of man's dignity does not comport with making even those we would punish completely "stateless"—fair game for the despoiler at home and the oppressor abroad, if indeed there is any place which will tolerate them at all.

On procedure I think we are bound as judges to face and decide this issue. It is unfair to the capable and experienced lawyer who presented this appeal to hold that he did not present this argument. For what other possible reason could he have made the specific and exact citation I have given above? His refreshingly brief statement, I conceive,

needed no more. But I had supposed that we were bound in any event to do justice and administer the law as between the parties who have come before us.

[fol. 19] In United States Court of Appeals for the Second Circuit

Present: Hon. Charles E. Clark, Chief Judge, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

Albert L. Trop, Plaintiff-Appellant,

v.

John Foster Dulles & United States Department of State, Defendants-Appellees

Appeal from the United States District Court for the Eastern District of New York. Judgment—December 28, 1956.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of the said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 20] [File endorsement omitted.]

[fol. 21] Clerk's Certificate to foregoing transcript omitted in printed.

[fol. 22] SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 710

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 4, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted; and the case is transferred to the summary calendar. The case is assigned for argument immediately following No. 572 and No. 415. The brief of counsel for the petitioner shall be filed by March 30, 1957, and that of the respondent by April 26, 1957.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4405-7)

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JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. ~~710~~ 70

ALBERT L. TROP,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OSMOND K. FRAENKEL,
120 Broadway,
New York 5, N. Y.,
Counsel for Petitioner.

INDEX

PAGE

PETITION:

The Opinions Below 1

Statement of Grounds of Jurisdiction 2

Question Presented for Review 2

Statute Involved 2

Statement of the Case 3

The Reasons Relied on for the Issuance of the Writ 4

APPENDIX:

Opinions of District Court 15

Opinions of Court of Appeals 16

Judgment of Affirmance 20

Table of Citations

CASES:

Acheson v. Kuniyuki, 189 F. 2d 741, cert. den. 342 U. S. 942 5

Acheson v. Okimura, 342 U. S. 899 ..... 8, 9

Acheson v. Wohlmuth, 196 F. 2d 866 5

Dos Reis v. Nicolls, 161 F. 2d 860 8

Gonzales v. Landon, 350 U. S. 920 ..... 5, 8

Kawakita v. United States, 343 U. S. 717 7

Mackenzie v. Hare, 239 U. S. 299 ..... 4, 5, 11, 17

Mandoli v. Acheson, 344 U. S. 133 ..... 7, 18

Mendoza-Martinez v. Mackey, 238 F. 2d 239 5

Nishiwaka v. Dulles, No. 415, cert. granted 352 U. S. 907 ..... 4, 5

Okimura v. Acheson, 99 F. Supp. 587 8

Okimura v. Acheson, 111 F. Supp. 303 9

CASES (continued): PAGE

Perez v. Brownell, No. 572, cert. granted 352 U. S. 908 ..... 4, 5
Perkins v. Elg, 307 U. S. 325 ..... 6, 17
Revedin v. Acheson, 194 F. 2d 482, cert. den. 344 U. S. 820 ..... 4, 12, 17
Savorgnan v. United States, 338 U. S. 491 ..... 4, 7, 11, 17
Slochower v. Board of Higher Education, 350 U. S. 551 10
Terada v. Dulles, 121 F. Supp. 6 9
United States v. Wong Kim Ark, 169 U. S. 649 ..... 5, 9
Vidales v. Brownell, 217 F. 2d 136 5

CONSTITUTION:

Constitution of the United States:
Eighth Amendment 18
Fourteenth Amendment 10

UNITED STATES CODE:

Title 8, Section 800 9
Title 8, Section 801 9
Title 8, Section 1101(33) 17
Title 8, Section 1481(a)(8) 1, 2, 18
Title 8, Section 1483(a) 18
Title 8, Section 1503(a) 16
Title 18, Section 2383-85 10

MISCELLANEOUS:

99 University of Pennsylvania Law Review 25, The Loss of American Nationality by Professor Roche 11
64 Yale Law Journal 1164, The Expatriation Act of 1954 ..... 10, 12, 19

Supreme Court of the United States

October Term, 1956

No.

—o—

ALBERT L. TROP,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE,

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully ask this Court to issue a writ of certiorari to review the final order of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Eastern District of New York dismissing petitioner's complaint in an action for declaratory judgment with regard to petitioner's nationality. The action challenges the constitutionality of Section 401(g) of the Nationality Act of 1940 [now 8 U. S. C. 1481(a)(8)].

(a) The Opinions Below

The opinions of the District Court and of the Court of Appeals have not yet been reported. Copies thereof are hereto annexed (pp. 15-19, *infra*).

(b) Statement of Grounds of Jurisdiction

1. The order of the Court of Appeals was rendered on December 28, 1956 and is final.

2. No application was made for rehearing.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254 (1).

(c) Question Presented for Review

1. May Congress deprive a native born citizen of his nationality solely because he has been convicted of the technical offense of desertion in war time by court martial and, for that reason, dishonorably discharged from the armed forces, absent any contact with the enemy or with any foreign state or intent to make such contact, with the result that loss of American nationality would result in statelessness?

(d) Statute Involved

§ 401(g) of the Nationality Act of 1940 [now 8 U. S. C. 1481(a)(8)].

> "(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> • • •
>
> (8) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: *Provided*, That, nothwithstanding loss of nationality or citizenship under the terms of this chapter or previous laws by reason of desertion committed in time of war, restoration to active duty with

such military, air, or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restoring such nationality or citizenship heretofore or hereafter so lost; * * *."

(e) Statement of the Case

Petitioner is a native born citizen (3a).* While serving in the army in 1944 in French Morocco he was confined in Casablanca for a breach of discipline and escaped from confinement, finding conditions intolerable. He was then 20 years old (4a). Petitioner has not become a foreign national, nor intended to become one, nor did he have any contact with an enemy, nor did he desert to the enemy—he did not even try to reach the Spanish-Moroccan border (4a).

On the basis of those facts court martial proceedings were instituted. One of the charges was "Desertion from May 22 to May 23, 1944" (5a). At his court martial there was no claim that petitioner had deserted to the enemy or attempted to do so. On the contrary, the testimony showed that he surrendered without question to an American officer the day after he escaped (5a). He was convicted on all the charges and dishonorably discharged (3a).

In 1952 petitioner's application for a passport was refused on the ground that he had lost his American nationality (3a). This suit for declaratory judgment was instituted on December 29, 1955 (1a)—thus well within the five years specified in 8 U. S. C. 1503(a) which authorizes the maintenance of actions such as this.

In the District Court both parties moved for summary judgment (1a), both agreeing that no issues of fact existed.

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* The references are to Appellant's Appendix in the Court below.

Judge Inch found that there were no issues of fact, denied petitioner's motion and granted the motion of defendants (6a). His brief memoranda discuss none of the issues of constitutionality raised by petitioner (*infra*, p. 15).

The majority of the Court of Appeals, in an opinion by Judge L. Hand (*infra*, pp. 16-18) also did not discuss those issues, contenting themselves with the statement that there was not sufficient doubt about the constitutionality of the statute to interpret it, as petitioner had asked, as limited to desertions to the enemy. Judge Hand appeared to be of the view that petitioner's chief contention was that he could not lose his nationality without intending to do so, and, to overcome that man of straw, Judge Hand cited *Mackenzie* v. *Hare*, 239 U. S. 299; *Savorgnan* v. *United States*, 338 U. S. 491; *Revedin* v. *Acheson*, 194 F. 2d 482, cert. den. 344 U. S. 820. As we shall show, those cases are not dispositive of the issue here presented.

In dissent (*infra*, p. 19), Judge Clark expressed the view that loss of nationality under the circumstances here disclosed would constitute cruel and unusual punishment. The majority did not discuss that question, claiming it had not been urged upon them by petitioner.

(f) The Reasons Relied on for the Issuance of the Writ

The Court below has decided an important question of constitutional law which has not been settled by this Court and should be, and it has misconceived the scope and effect of this Court's decisions in *Mackenzie* v. *Hare*, *supra*, and *Savorgnan* v. *United States*, *supra*. Moreover, similar issues are before this Court in *Nishiwaka* v. *Dulles*, No. 415, cert. granted 352 U. S. 907, and *Perez* v. *Brownell*, No. 572, cert. granted 352 U. S. 908.

1. Despite the statement in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 703, that the Constitution had not given Congress any express power to take away citizenship, it has been recognized that a citizen can expatriate himself. Since the consent of Congress to such expatriation is necessary laws have been passed declaring that certain acts amount to expatriation. Among these are: service in the armed forces of a foreign state [8 U. S. C. 1481(a)(3)]—an issue involved in *Nishiwaka*; voting in a foreign election [*id.* (5)]), as in *Perez*;* conviction for advocating the overthrow of the government by force [*id.* (10) as amended in 1954]; absence from the country with intent to evade the draft [*id.* (10)], as also in *Perez* [and in *Gonzales* v. *Landon*, 350 U. S. 920, where it was not decided].**

But this Court has never defined the extent of Congressional power in relation to expatriation. It has moved from case to case without having announced principles applicable to the great variety of situations which Congress has declared will result in loss of nationality.

The first case dealing with the problem is *Mackenzie* v. *Hare*, 239 U. S. 299, which held that a native born woman could lose her citizenship by marriage to an alien when at the time of her marriage the law so provided. This Court upheld the law because of the ancient principle of "identity" of husband and wife.

As Mr. Justice McKenna said:

> "* * * and this relation and unity may make it of public concern in many instances to merge their iden-

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* Cf. *Acheson* v. *Kuniyuki*, 189 F. 2d 741, cert. den. 342 U. S. 942; *Acheson* v. *Wohlmuth*, 196 F. 2d 866.

** Cf. *Vidales* v. *Brownell*, 217 F. 2d 136; *Mendoza-Martinez* v. *Mackey*, 238 F. 2d 239.

> tity, and give dominance to the husband. It has purpose if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy * * * " (p. 311).
>
> " * * * The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected" (p. 312).

The considerations which there led this Court to that conclusion are, of course, wholly absent here.

In *Perkins* v. *Elg*, 307 U. S. 325, where this Court ruled that citizenship could not be lost because of parental action during minority, Chief Justice Hughes stressed that expatriation must result from voluntary action:

> " * * * Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking. That right is fittingly recognized where a child born here, who may be, or may become, subject to a dual nationality, elects on attaining majority citizenship in the country to which he has been removed. But there is no basis for invoking the doctrine of expatriation where a native citizen who is removed to his parents' country of origin during minority returns here on his majority and elects to remain and to maintain his American

citizenship. Instead of being inconsistent with the right of expatriation, the principle which permits that election conserves and applies it."

Later cases decided by this Court have added nothing in elucidation of the problem here present. *Mandoli* v. *Acheson*, 344 U. S. 133, dealt only with dual nationality. This Court rejected the government's claim that American citizenship had been lost by service in the Italian army because that service and the accompanying oath of allegiance had not been voluntary. And it rejected the further claim that citizenship had been lost because of failure to return to the United States upon reaching 21 years because the provision dealing with that subject affected only naturalized citizens. This Court, therefore, did not discuss any questions of Congressional power and the dissenters based their views solely on the fact that an oath of allegiance to Italy had been taken by plaintiff.

Savorgnan v. *United States*, 338 U. S. 491, holds merely that a native born citizen who voluntarily became a citizen in a foreign country had thus expatriated herself, at least when she took up actual residence in the country of her choice. Indeed it is significant to note that the government conceded in that case that the State Department had since 1933 considered actual residence abroad a necessary element of expatriation (*id.* 503).

The *Kawakita* case (343 U. S. 717) presented the problem in reverse. There a person born in this country of Japanese citizens claimed that he had expatriated himself and therefore could not be prosecuted for treason. He based his claim on the fact that under Japanese law he was a Japanese national despite his birth in the United States and that while in Japan after the outbreak of the war he registered in the Japanese Family Census Register, claiming that he thereby renounced his American nationality.

The Trial Court left it to the jury to determine whether or not he had expatriated himself because after the war he held himself out to be an American citizen and claimed that what he had done in Japan was the result of pressure. This Court affirmed the conviction for treason on the ground that the issue whether Kawakita had intended to make a declaration of allegiance to Japan had been properly left to the jury.

Acheson v. *Okimura*, 342 U. S. 899, and *Gonzales* v. *Landon*, 350 U. S. 920, went off on the sufficiency of the evidence. No one of these cases discussed the extent of Congressional power.

But the Court of Appeals for the First Circuit in *Dos Reis* v. *Nicolls*, 161 F. 2d 860, at 862, has expressed doubts about Congressional power. Judge Magruder pointed out (pp. 863, 864) that the Cabinet Committee which had sponsored the 1940 recodification had written to the President: "None of the various provisions in the Code concerning loss of American nationality * * * is designed to be punitive or to interfere with freedom of action. They are merely intended to deprive persons of American nationality when such persons, by their own acts, or inaction, *show that their real attachment is to the foreign country and not to the United States.*" (Emphasis ours.) The Court, however, so construed the applicable statute as to make it unnecessary to deal directly with the constitutional issue.

In *Okimura* v. *Acheson*, 99 F. Supp. 587, the Court held certain statutory provisions unconstitutional as dealing with situations other than voluntary expatriation. The Court said:

> "It is the view of this Court that while the Constitution gives the Congress plenary power over citizenship by *naturalization*, it leaves the Congress no power whatsoever to interfere with American citizenship by *birth*.

> "The leading case on this subject is United States v. Wong Kim Ark, 1898, 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890. While some of its teachings seem to have been occasionally forgotten or whittled down in recent years, it has never been overruled.
>
> * * *
>
> "Section 800 of Title 8, United States Code Annotated, deals eloquently with the 'right' of expatriation, yet Section 801, applicable alike to native and naturalized citizens, attempts to spell out some ways in which that 'right' may become a liability.
>
> "Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated. Congress has been given control over only one means of *creating* United States citizenship, namely by naturalization. It has the power to create and to condition that grant of citizenship; but is wholly devoid of any power to destroy citizenship by birth" (p. 590).

After this Court remanded the case for further proof, without any discussion of the constitutional issue (*Acheson* v. *Okimura,* 342 U. S. 899), the District Court adhered to the views previously expressed (111 F. Supp. 303)—but since the case was also decided on the facts it was not appealed. In *Terada* v. *Dulles,* 121 F. Supp. 6, the same views were elaborated.

These various opinions suggest the principle that Congress may provide for loss of nationality—or, in another sense, consent to the citizen's surrender of his nationality—in cases where the citizen has, by his own voluntary act, acquired a new nationality or, where dual citizenship exists, chosen to adhere to the other nationality. We submit that this is the extent of Congressional power and that there can be no question of loss of American nationality (and therefore none of consent to such loss) where the proscribed act has no relation to the acquisition of another

nationality. Anything else would be a denial of due process. (*Slochower* v. *Board of Higher Education*, 350 U. S. 551.)

It must be remembered that the Constitution (Amendment 14) states that "All persons born * * * in the United States * * * are citizens of the United States" and that it contains no provision whatsoever giving Congress any power to take that citizenship away. All Congress can do is to consent to a citizen's own intent to expatriate himself. It would be a denial of due process for Congress to declare that certain acts result in loss of citizenship unless those acts are of such a character as, at least, to show an intention to acquire another nationality. Otherwise Congress could, by the device of declaring that conviction for crime results in loss of nationality, add banishment as a penalty for the native born as well as for the alien. This might well be cruel and unusual punishment forbidden by the Eighth Amendment.

One consequence of upholding Congressional power under the circumstances of this case would be that petitioner and others in like case would become stateless persons. Presumably they would be subject to deportation—but no country would accept them. They might be under various disabilities imposed by state legislation—thus such a person could not become a lawyer in many states and might be automatically disbarred if he had previously been one. This aspect of the case has been fully discussed in a Note in the Yale Law Journal entitled The Expatriation Act of 1954 (64 Yale L. J. 1164 at 1189-99). While the note is primarily concerned with loss of nationality arising from conviction under the Smith Act (18 U. S. C. 2383-85), much of what is said there is applicable to the situation here presented. But we cannot subscribe to the author's view (pp. 1185-86) that Congress has power to add expatriation to punishment for crime. Such a view, including as it must

the power to banish a native born citizen, is so foreign to all our concepts that it should not be given judicial sanction.

A view much more in harmony with our institutions was expressed by Professor Roche of Haverford, in The Loss of American Nationality, 99 University of Pennsylvania Law Review 25, at p. 70:

> "The legitimate end of an expatriation statute is to eliminate international problems of nationality by establishing standards by which it can be determined when an American has transferred his allegiance to another sovereign. Ideally speaking, an American should not be deprived of his citizenship until he has obtained that of some foreign state. At the very least, expatriation provisions should not be employed in the gratuitous creation of stateless persons by adding loss of citizenship to the other penalties for crimes against the sovereign."

In other words, having in mind the absence of specific provision in the Constitution for loss of nationality, the requirements of due process of law as guaranteed by the Fifth Amendment and the prohibition against cruel and unusual punishment contained in the Eighth Amendment, Congress may not declare that nationality can be lost except on the basis of some action voluntarily taken which has direct relationship to the acquisition of some other nationality.

2. The Court of Appeals' discussion of the subject of intent is, we submit, a misconception of what was decided by this Court in the cited cases. Those hold only that a person who does acts which result in the acquisition of another nationality may lose his American nationality without having the subjective intent to do so. Such was the case in *Mackenzie*, where the American national, a woman, obtained foreign nationality by marriage. In *Savorgnan*

and *Revedin* the American national affirmatively acquired foreign citizenship and went to live in the foreign country.

In all those cases the question was whether the act performed resulted in loss of nationality despite the claim by the person affected that such loss had not been intended. Since, in each of those cases there actually had been a voluntary expatriation, it of course was irrelevant that it was not understood or intended that American nationality should also be lost. It was quite proper for Congress to declare that dual nationality, under such circumstances, would be contrary to American interests. But here, where there has been no expatriation of any kind, no dual nationality could possibly come into being. There is, therefore, no basis on which Congress can "consent" to an expatriation which has not happened.

The majority of the court below has, accordingly, misunderstood and misapplied this Court's earlier decisions.

3. With regard to the question of cruel and unusual punishment discussed by Judge Clark, we would add only this: The discussion of the subject in the Yale Law Journal to which he refers (and which petitioner cited to the court below) related primarily to loss of nationality for conviction under the Smith Act but it suggested that because of the "inherent uncertainty of the consequences of expatriation" it is a measure of punishment which, if available at all, should be reserved for the most serious of all crimes. Since treason may be punished by death, banishment (which is, of course, what compulsory expatriation might amount to) might be proper punishment for such a crime. Moreover, the very nature of treason is such that it implies allegiance (although not by formal steps) to another government. No such considerations apply here.

4. In any event, the statute should not be held applicable where there was no desertion to the enemy.

Surely the issues here presented are substantial and important. We request, therefore, that certiorari be granted and suggest that the case be set down to be argued with Nos. 415 and 572.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX

Opinions of District Court

(Record page 9)

Motion by plaintiff for summary judgment declaring that he has not lost his United States citizenship. Although the papers herein show that there is no genuine issue as to any material fact, they do not show that plaintiff is entitled to a judgment as a matter of law. Therefore, this motion must be and hereby is denied. Settle order.
May 22, 1956.

ROBERT A. INCH,
Chief Judge, U. S. D. C.

(Record page 15)

Motion by defendants for summary judgment dismissing the complaint, wherein plaintiff asks for judgment declaring that he has not lost his United States citizenship.

The papers herein show that there is no genuine issue as to any material fact and that plaintiff has lost his United States citizenship by being convicted by court martial of deserting the U. S. military forces in time of war and, as a result thereof dishonorably discharged from the service of such military forces, the defendants are entitled to a judgment as a matter of law. Therefore, this motion must be and hereby is granted. Settle order.

May 22, 1956.

ROBERT A. INCH,
Chief Judge, U. S. D. C.

Opinions of Court of Appeals

HAND, *Circuit Judge:*

The plaintiff appeals from a judgment, summarily dismissing his complaint in an action under 1503(a) of Title 8, U. S. Code, for a judgment declaring him to be "a national of the United States." He is a native citizen, who was serving in 1944 in the United States Army in French Morocco; and the only question is whether he lost his "nationality" because he was convicted by the judgment of a court-martial of desertion "in time of war." The sentence of the court was that he was "to be dishonorably discharged from the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor * * * for three (3) years." Since the judgment of the district court was summary we are to accept as true the statements in the plaintiff's affidavit upon the motion that he had been imprisoned in Casablanca in May 1944 for an earlier breach of discipline, and found the condition so intolerable that in desperation he escaped. The next day he surrendered; and meanwhile he had made no attempt to leave the area under control of American troops. He had had no intention to "expatriate" himself or to become a national of any other country. Nor did he attempt to have any contact with any enemy of the United States, or to desert to any enemy of the United States, or to any foreign country; and no claim was made in the court-martial proceedings that he had done so.

As will appear, we do not find enough doubt of the constitutionality of the statute to resort to any but the natural meaning of the words: i.e., that "in time of war" desertion of any kind results in "expatriation." Indeed, the proviso for possible restoration of "nationality" makes it impossible to suppose that the crime was confined to desertion to the enemy. It was true that at common law

no subject could throw off his allegiance, and apparently the sovereign could not "expatriate" him. However, the Supreme Court, in *Mackenzie* v. *Hare,* 239 U. S. 299, held that the Act of 1907 (34 Stat. 1228) was valid which "expatriated" a woman who married an alien in this country; and that although she had not intended to surrender her citizenship, and did not suppose that she was doing so. Again, in *Savorgnan* v. *United States,* 338 U. S. 491, a native citizen in 1940 married a citizen of Italy then in this country, and between 1941 and 1945 lived with him in Italy as his wife. She came back to this country on an Italian passport, and the action, like that at bar, was to obtain a judgment recognizing her continued status as a citizen, on the ground that, although she knew that she was being naturalized as an Italian (that being a condition, as her husband told her, of the validity of her marriage), she did not know that she would forfeit her American status, and did not intend to surrender it. Nevertheless the court held that under the Act of 1940 she had done so, because her "place of general abode" between 1941 and 1945 had been Italy (§ 1101(33), Title 8, U. S. C.). See also *Revedin* v. *Acheson,* 194 F. 2d 482 (C. A. 2), certiorari denied 344 U. S. 820.

The important point in both these decisions is, not the especial "objective" facts that the court accepted as the test, but that on both occasions the citizen forfeited her "nationality," not only without supposing that she was doing so, but against her purpose. It is true that the act must not be that of an infant, *Perkins* v. *Elg,* 307 U. S. 325, 334. "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking." We will also assume, *arguendo,* that the same

is true when the act is under duress;* but when it is voluntary and the actor is *sui juris*, it is not necessary that he shall be aware that what he does will "expatriate" him, any more than it is in many other situations where the law imposes liability regardless of the actor's knowledge of the legal effects of his act.

There is still another reason why we may not limit the word "desertion" to desertion to an enemy of the United States. Section 1483(a) of Title 8 provides that, except for subsections 7, 8 and 9, none of the acts mentioned in § 1481 shall result in "expatriation" if they occur within the United States, unless they are followed by a "residence outside the United States." Subdivision 7 provides for a "formal written renunciation," subdivision 9 is for treason and subdivision 8 is the one at bar. Thus Congress provided that "in time of war" desertion within the United States should at once and unconditionally result in "expatriation" if determined by the conviction of a court-martial, and it would be most unreasonable to confine desertions "within the United States" to desertions to an enemy.

We have not considered, and do not consider, whether under the circumstances at bar "expatriation" was, or was not, a "cruel and unusual" punishment under the Eighth Amendment. The plaintiff did not suggest anything of the kind in his complaint, or upon the motion for summary judgment; Judge Inch did not mention it in disposing of the motion, nor did the plaintiff do so in argument. The only part of the brief that by the widest latitude could be considered as so much as a vague intimation of the sort is a passage on page 11; and that did not mention the amendment, but appears to be a part of the general argument that all involuntary expatriation is a denial of "Due Process of Law."

Judgment affirmed.

* * *

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* See *Mandoli* v. *Acheson*, 344 U. S. 133.

CLARK, *Chief Judge* (dissenting):

I am constrained to disagree with both the substance and the procedural form of the result here reached. Plaintiff-appellant has cited to us and obviously relied on the masterful analysis of expatriation legislation set forth in the Comment, *The Expatriation Act of 1954*, 64 Yale L. J. 1164, 1189-1199. I agree with the author's documented conclusions therein that punitive expatriation of persons with no other nationality constitutes cruel and unusual punishment and is invalid as such. Since I doubt if I can add to the persuasive arguments there made, I shall merely incorporate by reference. In my faith, the American concept of man's dignity does not comport with making even those we would punish completely "stateless"—fair game for the despoiler at home and the oppressor abroad, if indeed there is any place which will tolerate them at all.

On procedure I think we are bound as judges to face and decide this issue. It is unfair to the capable and experienced lawyer who presented this appeal to hold that he did not present this argument. For what other possible reason could he have made the specific and exact citation I have given above? His refreshingly brief statement, I conceive, needed no more. But I had supposed that we were bound in any event to do justice and administer the law as between the parties who have come before us.

Judgment of Affirmance

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of December, one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK,
Chief Judge.
HON. LEARNED HAND,
HON. THOMAS W. SWAN,
Circuit Judges.

ALBERT L. TROP,
Plaintiff-Appellant,

v.

JOHN FOSTER DULLES, as Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Office - Supreme Court, U.S.
FILED
MAR 3 0 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. ~~710~~ 70

ALBERT L. TROP,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

Osmond K. Fraenkel,
Counsel for Petitioner.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Statute Involved	2
Question Presented	2
Statement	3
Summary of Argument	4
Argument	6
I—The power of Congress to expatriate is confined to a consent to expatriation desired by the citizen or to a regulation of dual citizenship	6
II—The subsection here relied on is beyond the power of Congress for lack of rational relation between citizenship and the act specified	14
III—If the penalty be deemed punishment for the offense of desertion it is void	18
IV—The statute should be construed so as to avoid doubt about its constitutionality	22
Conclusion	23

Cases Cited

Acheson v. Okimura, 342 U. S. 899	10, 12
Bailey v. Alabama, 219 U. S. 219	17
Bell v. United States, 349 U. S. 81	18
Butler v. Michigan, 352 U. S. —	17
Carver, In re, 142 Fed. 623	13
Dos Reis v. Nicolls, 161 F. 2d 860	7, 11
Galvan v. Press, 347 U. S. 522	14
Giboney v. Empire Storage & Ice Co., 336 U. S. 490	15
Gonzales v. Landon, 350 U. S. 920	10, 14

PAGE

Harisiades v. Shaughnessy, 342 U. S. 580 14
Hemans v. United States, 163 F. 2d 228, cert. den. 332 U. S. 801 20

Kawakita v. United States, 343 U. S. 717 10
Kurtz v. Moffitt, 115 U. S. 487 13

Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U. S. 525 15

Mackenzie v. Hare, 239 U. S. 299 ..... 4, 8, 12, 16
Mandoli v. Acheson, 344 U. S. 133 10
McDonald v. Commonwealth, 173 Mass. 322, 53 N. E. 874 20

Okimura v. Acheson, 99 F. Supp. 587 11
O'Neil v. Vermont, 144 U. S. 323 18

Perez v. Brownell, 235 F. 2d 365 ..... 12, 16
Perkins v. Elg, 307 U. S. 325 9
Peters v. Hobby, 349 U. S. 331 22

Revedin v. Acheson, 194 F. 2d 482, cert. den. 344 U. S. 820 ..... 4, 16
Russian Volunteer Fleet v. United States, 282 U. S. 481 14

Savorgnan v. United States, 338 U. S. 491 ..... 4, 8, 9, 12, 16
Shaughnessy v. United States, 345 U. S. 206 21
Slochower v. Board of Higher Education, 350 U. S. 551 15

Talbot v. Jansen, 3 Dall 133 (1795) 6
Terada v. Dulles, 121 F. Supp. 6 12
Toth v. Quarles, 350 U. S. 11 14

United States v. Rumely, 345 U. S. 41 22
United States v. Snow, 27 Fed. Cas. 1255 13

Weems v. United States, 217 U. S. 349 ..... 19, 20
Wieman v. Updegraff, 344 U. S. 183 15
Wong Wing v. United States, 163 U. S. 228 14

Zakonaite v. Wolf, 226 U. S. 272 14

Statutes Cited

	PAGE
Title 8, U. S. C., Section 1481(a)(8)	2
Title 10, U. S. C., Section 1499	3

Authorities Cited

Art. 15, U. N. Doc. A/810	22
53 Col. L. Rev. 633 (1953)	22
99 University of Pennsylvania Law Review 25, at p. 70	21
64 Yale L. J. 1164, at 1167 and 1189	20, 21
74 Yale Law J. 1164, 1187-1199	21
Zeballos, E. S.—La Nationalité—Denationalisation (1919) 262-263	13

Supreme Court of the United States

October Term, 1956

No. 710

ALBERT L. TROP,

Petitioner,

vs.

JOHN FOSTER DULLES, as Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

The opinions of the District Court (R. 5) have not been reported. The opinion of the Court of Appeals (R. 10-13) is reported at 239 F. 2d 527.

Jurisdiction

The judgment of the Court of Appeals was rendered on December 28, 1956 (R. 10). Petition for a writ of certiorari was filed on January 24, 1957 and was granted on March 4, 1957 (R. 15). The jurisdiction of this Court rests on U. S. C. Title 28, Section 1254(1).

Statute Involved

Subsection (g) of Section 401 of the Nationality Act of 1940, as amended January 20, 1944 (58 Stat. 4), now, with a few verbal changes, subsection (8) of Section 349 of the Immigration and Nationality Act of 1952 [U. S. C. Title 8, Section 1481(a)(8)]:

> "(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> "(8) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: *Provided*, That, notwithstanding loss of nationality or citizenship under the terms of this chapter or previous laws by reason of desertion committed in time of war, restoration to active duty with such military, air, or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restoring such nationality or citizenship heretofore or hereafter so lost; * * *."

Question Presented

May Congress deprive a native born citizen of his nationality solely because he has been convicted of the technical offense of desertion for one day in war time by court martial and, for that reason, dishonorably discharged from the armed forces, absent any contact with the enemy or with any foreign state or intent to make such contact, with the result that loss of American nationality would result in statelessness?

Statement

Petitioner brought this suit, pursuant to U. S. C. Title 28, Section 2201, and Title 8, Section 1503, for a declaratory judgment that he is a citizen of the United States (R. 2). The suit arose because of the denial of a passport applied for in 1952 (R. 2). The denial rested solely on the claim by the State Department that petitioner had lost his American nationality because of dishonorable discharge from the army following a court martial conviction for desertion * in time of war (R. 2).

The case was decided in the District Court on the basis of affidavits and documents presented by the parties on cross-motions for summary judgment (R. 5). Both parties agreed there were no facts in dispute and the Court so found (R. 5).

The papers submitted in the District Court showed the following (R. 2, 3):

Petitioner is a native born citizen. While serving in the army in 1944 in French Morocco he was confined in Casablanca for a breach of discipline and, finding conditions intolerable, he escaped from confinement. He was then 20 years old. Petitioner has not become a foreign national, nor intended to become one, nor did he have any contact with an enemy, nor did he desert to the enemy—he did not even try to reach the Spanish-Moroccan border.

On the basis of those facts court martial proceedings were instituted. One of the charges was "Desertion from May 22 to May 23, 1944" (R. 4). At this court martial there was no claim that petitioner had deserted to the enemy or attempted to do so. On the contrary, the testi-

* The definition of deserter was in 1944 (10 U. S. C. 1499): "Any person subject to military law who quits his organization or place of duty with intent to avoid hazardous duty or to shirk important service."

mony showed that he surrendered without question to an American officer the day after he escaped (R. 4). He was convicted on all the charges and dishonorably discharged (R. 9).

The District Court denied petitioner's motion and granted that of respondent without, in either of his brief memoranda, discussing any of the constitutional issues raised by petitioner (R. 5).

The majority of the Court of Appeals, in an opinion by Judge L. Hand (R. 10), also did not discuss those issues, contenting themselves with the statement that there was not sufficient doubt about the constitutionality of the statute to limit it, as petitioner had asked, to desertions to the enemy. Judge Hand appeared to be of the view that petitioner's chief contention was that he could not lose his nationality without intending to do so, and, to overcome that man of straw, Judge Hand cited *Mackenzie* v. *Hare*, 239 U. S. 299; *Savorgnan* v. *United States*, 338 U. S. 491; *Revedin* v. *Acheson*, 194 F. 2d 482, cert. den. 344 U. S. 820. As we shall show, those cases are not dispositive of the issue here presented.

In dissent, Judge Clark (R. 13) expressed the view that loss of nationality under the circumstances here disclosed would constitute cruel and unusual punishment. The majority did not discuss that question, claiming it had not been urged upon them by petitioner (R. 13).

Summary of Argument

The present case presents a problem of expatriation never before considered by this Court. It differs from *Nishikawa* v. *Dulles*, No. 415, and *Perez* v. *Brownell*, No. 572, which are being heard at the same time, in that the act which resulted in the claimed loss of nationality here did not have to occur in any foreign country and did not involve any conceivable aspect of dual citizenship.

Petitioner has been, thus far, deprived of his native born American citizenship without his having performed any act which in any way looked to the acquisition of citizenship elsewhere. There is no reasonable relationship between the act of technical one day desertion which formed the basis of the court martial and the consequent dishonorable discharge, and loss of nationality which the Act of Congress imposed for such act.

Insofar as the statute purports to deprive a native-born citizen of his nationality it is both in excess of the power of Congress and in violation of the due process clause of the Fifth Amendment. The cases relied on by the Court of Appeals all involved acts by which a second nationality was acquired. Wherever a dual nationality is acquired (or reacquired) the problem is that of discovering which is the *preferred* nationality and in such cases it is proper for Congress to establish evidentiary rules to aid the courts in determining whether United States citizenship has been voluntarily renounced in favor of the dual nationality. The power of Congress thus to regulate dual nationality has no bearing in this case. An act which has no reference to the acquisition or reinstatement of another nationality cannot be irrebutably presumed to manifest a voluntary renunciation of United States nationality. Such a presumption is inherently irrational and a gross violation of due process.

The statute may not be sustained as imposing an additional punishment for the offense already punished by the sentence of the court martial. But if so construed, rational relationship between the offense and the nature of the punishment is lacking. Moreover, such punishment, involving as it does the creation of a stateless status, would conflict with the Eighth Amendment guaranty against cruel and unusual punishment.

These grave constitutional problems could be avoided by confining the operation of the statute to desertions involving actual contact with the enemy. In that event the statute would have no application to petitioner.

ARGUMENT

I.

The power of Congress to expatriate is confined to a consent to expatriation desired by the citizen or to a regulation of dual citizenship.

The historical basis for the existing laws with regard to expatriation has been so fully described in the brief for petitioner in the *Perez* case (pp. 9-13) that we believe it useful to make only a few additional observations.

Early in our history Justice Paterson of this Court, in *Talbot v. Janson*, 3 Dall. 133, 153 (1795), suggested the desirability of an expatriation statute. The problem there arose because a person involved in privateering claimed he had become a French citizen. Justice Paterson observed that expatriation could not exist without a departure "with intention to leave this country, and settle in another. Ballard was and still is a citizen of the United States, unless perchance he be a citizen of the world. The latter is a creature of the imagination, and far too refined for any republic of ancient or modern times". Thus, by anticipation, he rejected the concept of statelessness. Justice Iredell discussed the matter further, pointing out (p. 162) that expatriation requires the consent of the government of original citizenship. But nowhere was it suggested that expatriation could be imposed. It is interesting to observe that Justice Iredell expressed doubt (p. 163) about the constitutionality of banishment.

As noted in the *Perez* brief (p. 12), no statute specifying the basis on which an American national might expatriate himself was enacted until 1907 (34 Stat. 1228) and that specified only three grounds: actual foreign naturalization, subscription to a foreign oath of allegiance and, in the case of a woman, marriage to a foreigner. All three grounds

involved regulation of dual nationality. It was not until 1940 that Congress attempted to provide for expatriation in other situations.

We submit that Congressional power is restricted to prescribing the permissible forms by which a citizen's desire to expatriate himself may be manifested or to regulation of dual nationals. It does not extend to a situation such as is here presented. Since there is no express provision in the Constitution giving Congress any control whatever over the nationality of native born citizens, its right to exercise such control must rest on the nebulous concept of the inherent right of sovereignty. That right would be sufficient to support a regulation of dual nationals abroad and might, therefore, be sufficient to uphold certain of the subsections of the 1940 law, as, for instance, subsections (e) and (e), which dealt with service in foreign forces and voting in foreign elections. Such acts might, under certain circumstances justify an inference of expatriation. But that would support only a rebuttable presumption, not the fiat of the present law. The power to deal with dual nationals would also support Congressional definition of the precise forms whereby allegiance to a foreign country might be exhibited—as, for instance, subsections (a), (b), (d) or (f) of the 1940 Act. But neither of these concepts justifies subsection (g) here involved. Petitioner never had dual nationality; he has done nothing evincing an intention to acquire any foreign citizenship; he has done nothing which could achieve that result. Petitioner has done nothing to show, to quote from the Cabinet Committee which sponsored the 1940 recodification, that his "real attachment is to the foreign country and not to the United States" (See *Dos Reis* v. *Nicolls*, 161 F. 2d 860, at 863, 864).

Indeed, in the case at bar there is no foreign country involved at all. For the circumstance that petitioner's "desertion" occurred outside the United States is wholly

accidental. Petitioner did not choose to go to North Africa; he was taken there as a member of the armed forces. Nor does the statute in any way condition its effect on the presence of the "deserter" in a foreign country.

As will appear from a review of this Court's decisions in this area, it has only twice sustained deprivation of a native born American's nationality. And in both those cases, *Mackenzie* v. *Hare*, 239 U. S. 299, and *Savorgnan* v. *United States*, 338 U. S. 491, the acts held to constitute expatriation were such that by virtue of them a new nationality was voluntarily acquired. In each case American international relationships were involved, with the possibility of diplomatic embarrassment. But here the act charged had no connection with any other nation and could not possibly result in diplomatic embarrassment. To paraphrase *Savorgnan* at p. 500, loss of nationality cannot be regarded as among the "usual legal consequences" of every war time desertion.

The actual decision in *Mackenzie* was only that a native born woman lost her citizenship by marriage to an alien because of the ancient principle of "identity" of husband and wife. As Mr. Justice McKenna said:

> "* * * and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy * * *" (p. 311).
>
> "* * * The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would

> not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected" (p. 312).

The considerations which there led this Court to that conclusion are, of course, wholly absent here.

In the *Savorgnan* case, *supra*, this Court in effect limited the broad statement of *Mackenzie* to the situation where the native born citizen had left the United States and taken up residence in the country of her choice. Indeed, in that case the government conceded that since 1933 the State Department had considered that expatriation could not result without actual residence abroad (338 U. S. at 503).

In *Perkins* v. *Elg*, 307 U. S. 325, where this Court ruled that citizenship could not be lost because of parental action during minority, Chief Justice Hughes stressed that expatriation must result from voluntary action (p. 334):

> " * * * Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking. That right is fittingly recognized where a child born here, who may be, or may become, subject to a dual nationality, elects on attaining majority citizenship in the country to which he has been removed. But there is no basis for invoking the doctrine of expatriation where a native citizen who is removed to his parents' country of origin during minority returns here on his majority and elects to remain and to maintain his American citizenship. Instead of being inconsistent with the right of expatriation, the principle which permits that election conserves and applies it."

Later cases decided by this Court have added nothing in elucidation of the problem here present. *Mandoli* v. *Acheson*, 344 U. S. 133, dealt only with dual nationality. This Court rejected the government's claim that American citizenship had been lost by service in the Italian army because that service and the accompanying oath of allegiance had not been voluntary. And it rejected the further claim that citizenship had been lost because of failure to return to the United States upon reaching 21 years because the provision dealing with that subject affected only naturalized citizens. This Court, therefore, did not discuss any questions of Congressional power and the dissenters based their views solely on the fact that an oath of allegiance to Italy had been taken by plaintiff.

Kawakita v. *United States*, 343 U. S. 717, presented the problem in reverse. There a person born in this country of Japanese citizens claimed that he had expatriated himself and therefore could not be prosecuted for treason. He based his claim on the fact that under Japanese law he was a Japanese national despite his birth in the United States and that while in Japan after the outbreak of the war he registered in the Japanese Family Census Register, claiming that he thereby renounced his American nationality. The trial court left it to the jury to determine whether or not he had expatriated himself because after the war he held himself out to be an American citizen and claimed that what he had done in Japan was the result of pressure. This Court affirmed the conviction for treason on the ground that the issue whether Kawakita had intended to make a declaration of allegiance to Japan had been properly left to the jury.

Acheson v. *Okimura*, 342 U. S. 899, and *Gonzales* v. *Landon*, 350 U. S. 920, went off on the sufficiency of the evidence. No one of these cases discussed the extent of Congressional power.

But the Court of Appeals for the First Circuit in *Dos Reis* v. *Nicolls*, 161 F. 2d 860, at 862, has expressed doubts about Congressional power. The court, however, so construed the applicable statute as to make it unnecessary to deal directly with the constitutional issue.

In *Okimura* v. *Acheson*, 99 F. Supp. 587, the Court held certain statutory provisions unconstitutional as dealing with situations other than voluntary expatriation. The Court said:

> "It is the view of this Court that while the Constitution gives the Congress plenary power over citizenship by *naturalization*, it leaves the Congress no power whatsoever to interfere with American citizenship by *birth*.
>
> "The leading case on this subject is United States v. Wong Kim Ark, 1898, 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890. While some of its teachings seem to have been occasionally forgotten or whittled down in recent years, it has never been overruled." (p. 589)
>
> * * *
>
> "Section 800 of Title 8, United States Code Annotated, deals eloquently with the 'right' of expatriation, yet Section 801, applicable alike to native and naturalized citizens, attempts to spell out some ways in which that 'right' may become a liability.
>
> * * *
>
> "Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated. Congress has been given control over only one means of *creating* United States citizenship, namely by naturalization. It has the power to create and to condition that grant of citizenship; but is wholly devoid of any power to destroy citizenship by birth" (p. 590).

After this Court remanded the case for further proof, without any discussion of the constitutional issue (*Acheson* v. *Okimura, supra*), the District Court adhered to the views previously expressed (111 F. Supp. 303)—but since the case was also decided on the facts it was not appealed. In *Terada* v. *Dulles*, 121 F. Supp. 6, the same views were elaborated.

These various opinions suggest the principle that Congress may provide for loss of nationality—or, in another sense, consent to the citizen's surrender of his nationality—in cases where the citizen has, by his own voluntary act, acquired a new nationality or, where dual citizenship exists, chosen to adhere to the other nationality. We submit that this is the extent of Congressional power.

This, indeed, is what this Court held in *Mackenzie* and repeated in *Savorgnan*. But the lower courts have distilled a different doctrine from the statement in *Mackenzie*: that *any* act which Congress describes as one of voluntary expatriation is a "ground" for expatriation if performed without duress. The extent to which the new doctrine of compulsory expatriation has gained headway in the lower courts is startling. It is, perhaps, best exemplified by the comment of the Court of Appeals for the Ninth Circuit in *Perez*, 235 F. 2d at 365, where Judge Tolin said:

> "Legislation providing for expatriation has been known in the United States at least since 1865 when Congress provided for forfeiture of the right of citizenship of deserters and enlisted draftees who depart from their district or from the United States with intent to avoid draft into the armed forces. The validity of the Act was assumed and its effectiveness as an expatriation statute applied in a series of cases.
>
> "It is not difficult to appreciate that a nation which requires successful applicants for naturaliza-

> tion to take an oath that they will render either military or certain service in lieu thereof, to the United States, would logically impose expatriation upon native-born citizens who repudiate a like obligation. * * *"

As to the 1865 statute, it should be noted that *Kurtz* v. *Moffitt*, 115 U. S. 487, cited by Judge Tolin as authority for the proposition that the statute was valid and resulted in expatriation, does not support his conclusion. This Court there held only that a deserter could not be arrested by a state officer. Its only reference to the 1865 Act was that "forfeiture of all rights of citizenship" could take effect only upon court martial conviction. *In re Carver*, 142 Fed. 623, and *United States* v. *Snow*, 27 Fed. Cas. 1255, also cited by Judge Tolin, spoke only in terms of "rights of citizenship" under the 1865 and 1912 versions of the statute, which they were not called upon to, and did not, apply.

This distinction, between loss of nationality and loss of rights of citizenship, was elaborated by the distinguished Argentine jurist, E. S. Zeballos. In part two of his lectures on nationality * he said:

> "The confusion is serious, since nationality is a question of international law. It often contrasts the nationality of an inhabitant of one place with his nationality in another. On the contrary, the right of citizenship is a matter of internal politics, its object is to enable a man or woman to exercise an influence on the conduct of government and to take part in it."

In other words, since nationality is a matter of international law it can be regulated only where international considerations come into question and not, as the lower courts seem to think, because of solely domestic concerns.

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* La Nationalite—Denationalisation (1919), pp. 262-263 (freely translated). See also his discussion of the early American history of the subject at pp. 331-379.

We urge, therefore, that this Court once and for all put an end to the noxious doctrine that expatriation may be imposed, whether as punishment or for any other considerations which may, from time to time, sway a Congressional majority. The subsection here under review should be struck down as wholly beyond Congressional power. That this Court will not hesitate to strike down an Act of Congress when it transcends its power is evident from *Toth* v. *Quarles*, 350 U. S. 11. There the Court held that the war power, extensive though it be, did not permit Congress to vest courts martial with jurisdiction to try former service personnel for crimes committed while in the service. So here this Court should conclude that, despite the broad scope of the doctrine of "inherent sovereignty," Congress has no power to decree denationalization except as a regulation of dual nationality or in a case where some step has been taken by the American citizen toward obtaining foreign citizenship.

II.

The subsection here relied on is beyond the power of Congress for lack of rational relation between citizenship and the act specified.

If Congress has power over the citizenship of native born Americans beyond that above described, that power must be exercised within the general limitations of the Constitution. One of these limitations is the due process clause of the Fifth Amendment. There can be no doubt that it is applicable here. Since it is a limitation on the power of Congress in dealing with aliens * it follows, a

* See *Zakonaite* v. *Wolf*, 226 U. S. 272; *Wong Wing* v. *United States*, 163 U. S. 228. Cf. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481. This was recognized both in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 586, and *Galvan* v. *Press*, 347 U. S. 522, 530. Cf. *Gonzales* v. *Landon*, 350 U. S. 920.

fortiori, that it limits Congressional power over expatriation.

While this Court has, in recent years, indicated a reluctance to strike down legislation because of a lack of reasonable relationship between its objective and the regulation or penalty imposed (*Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525, 536; *Gibbney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 499), it has, nevertheless, not hesitated to do so in a proper case. Thus, in *Slochower* v. *Board of Higher Education*, 350 U. S. 551, the Court struck down a provision of the charter of the City of New York because the penalty, forfeiture of position by reason of the exercise of the privilege against self-incrimination before a body having no jurisdiction whatever over the conduct of the municipal employee, had no rational relation to the objective of the law, namely, disclosure to a public body concerned with the conduct of public employees.

In *Wieman* v. *Updegraff*, 344 U. S. 183, the Court unanimously struck down an Oklahoma statute because the penalty, disqualification for public office because of innocent membership in an organization supposed to be subversive, had no rational relation to the objective of the law, namely, the weeding out of subversive employees.

The lack of adequate rational relationship here between the objective sought, namely, undivided allegiance to the United States, and loss of nationality imposed for a dishonorable discharge based on a technical desertion for one day, hardly requires elaboration. Here nothing has been done which by the remotest stretch of the imagination justifies an inference of a purpose to transfer allegiance or to acquire any other nationality.

And our argument does not involve, as the Court below appeared to suppose (R. 11, 12), a ruling that there must be an intent to lose American citizenship. Citizenship may

to be sure, be lost when the national takes an affirmative step toward acquiring another nationality or expresses a preference for a dual nationality which he possesses, even though he be ignorant of the consequences of his act. In such a situation intent is irrelevant. But it is the intent to *lose* American nationality which is irrelevant, not the intent to *acquire* another nationality. That is crucial. So that unless the act performed has that effect it cannot be made the basis of denationalization. Anything else is pure legislative fiat, void as denial of due process.

In the cases cited by the court below (R. 11, 12) the problem here presented did not arise. For those cases held only that a person who voluntarily acquires another nationality thereby loses his American nationality even if he does not have the subjective intent to do so. Such was the case in *Mackenzie*, where the American national, a woman, obtained foreign nationality by marriage, and in *Savorgnan* and *Revedin*, where the American national voluntarily sought and acquired foreign citizenship and went to live in the foreign country.

Since in each of those cases there actually had been a voluntary acquisition of a new nationality, it was irrelevant that it was not understood or intended that American nationality should also be lost. It was quite proper for Congress to declare that dual nationality, under such circumstances, would be contrary to American interests. But here, where there has been neither an act of renunciation of United States citizenship nor an attempt at naturalization elsewhere, no dual nationality could possibly come into being. There is, therefore, no basis on which Congress can "consent" to an expatriation which has not happened.

In petitioner's brief in *Perez* (pp. 19-26) persuasive arguments are presented to demonstrate that, in effect, Congress has enacted a conclusive presumption that the performance of certain acts evidences a consent to loss of

nationality, when even a rebuttable presumption of such character might offend due process. We are glad to adopt these with only one additional observation.

Justification for the legislation here under attack is that the performance of the various acts listed as ground for loss of nationality constitutes that consent by the citizen without which it is clear there can be no expatriation. It would be just as appropriate to say that a person who violated the type of contract struck down in *Bailey* v. *Alabama*, 219 U. S. 219, after the law there involved was passed had agreed to be punished for fraud, as to say that petitioner, when he broke out of confinement in Casablanca, knowing that this might result in court martial for desertion and dishonorable discharge, had agreed to loss of nationality. Even with the most extreme application of the rule that everyone is presumed to know the law, the stretch required to accomplish the result claimed by the government defies common sense.

We submit, therefore, that regardless of the extent of Congressional power over loss of nationality there is here lacking such rational relationship between the act precipitating the alleged expatriation and the legitimate concern of Congress with allegiance to the United States as to result in denial of due process.

Pertinent is the observation of Mr. Justice Frankfurter, speaking for a unanimous Court in *Butler* v. *Michigan*, 352 U. S.—:

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal."

So, here, subsection (g) is not reasonably restricted to the evil—abandonment of allegiance to the United States by adherence to its enemy in time of war. And like the statute in *Butler* it should be struck down.

III.

If the penalty be deemed punishment for the offense of desertion it is void.

If loss of nationality be viewed, not as a regulation of citizenship, but as punishment for an offense, we submit it is nonetheless not permissible.

1. In the first place, considerations of fundamental fairness in the administration of punitive law require that the penalties be part of that law so that it can readily be ascertained what penalties are imposed for what offenses. Cf. *Bell* v. *United States*, 349 U. S. 81. In accordance with that principle many sections of Title 18 of the United States Code provide that, in addition to fine or imprisonment, conviction shall result in loss of some of the rights of citizenship (as, e.g. §§ 202, 205, 206, 207, 216, 218, 281, 282, 2381, 2383, 2385, 2387).

But it is significant that nothing of similar import is to be found in the Articles of War. At the time of the "desertion" here in question the relevant provisions were contained in Articles 28 and 58 (10 U. S. C. 1499 and 1530); later these were consolidated into Section 679 of Title 50, now 10 U. S. C. 885. The only penalty prescribed for desertion is such as may be imposed by the court martial, with the possibility of death sentence if the offense was committed in war time. But a court martial was by Article 42 (then 10 U. S. C. 1513) limited in its power of punishment to certain kinds of imprisonment. Moreover, the court martial here made no attempt to add loss of nationality to its penalty (R. 9).

While we have found no authority dealing with this aspect of the case, its reasonableness may be demonstrated by a suppositious situation. If a law purporting to regulate a particular industry provided that no person convicted of

a certain crime might be licensed, no one would suppose, if the regulation were held to be beyond legislative power, that the disqualification could be saved as an additional punishment for a crime of the specified character, though that crime had been committed after the passage of the law.

2. As a "punishment" loss of nationality is so disproportionate to the offense of "desertion" for one day that this itself constitutes denial of due process. For surely the power of punishment, great though it be, is no more immune from the requirement of due process than is any of the other powers of Congress.

While this Court does not appear to have struck down any general statute on the ground that the punishment inflicted had no rational relation to the offense,* there can be little doubt about its power to do so. But since the relevant considerations have generally been discussed in relation to the Eighth Amendment rather than the Fifth we shall do so likewise.

3. In considering the issue of cruel and unusual punishments the courts have recognized the principle that punishment for a particular crime might violate the Constitution even though, in the abstract, the punishment was not cruel or unusual, when it had no reasonable relation to the offense for which it was imposed.

In *O'Neil* v. *Vermont*, 144 U. S. 323, it was claimed that cumulative sentences violated the Constitution. This Court dismissed the writ of error because no federal question had been presented or considered. But Mr. Justice Blatchford noted (p. 331) that the Vermont court had said: "If the penalty was unreasonably severe for a *single* offence, the constitutional question might be urged." Mr. Justice Field, in dissent, believing that a federal question had been

* *Weems* v. *United States*, 217 U. S. 349, comes under the Eighth Amendment which we discuss *infra*.

raised, said (p. 364): "It is against the excessive severity of the punishment, as applied to the offences for which it is inflicted, that the inhibition is directed." And Justice Harlan and Brewer agreed (p. 371).

In *Weems* v. *United States*, 217 U. S. 349, this Court held void a Philippine statute because it found that the punishment provided was excessively severe for the particular offense. Mr. Justice McKenna said (p. 367) "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." In a review of the cases and authorities which had considered the subject he pointed out (p. 372) that the Eighth Amendment covered more than laws "which inflicted bodily pain or mutilation". In reaching the conclusion that the particular law under scrutiny violated the Constitution he compared (pp. 380, 381) the penalty there inflicted with the less severe penalties for more serious offenses.

More recently the same view was expressed, though as dictum only, by Judge Martin of the Sixth Circuit in *Hemans* v. *United States*, 163 F. 2d 228, cert. den. 332 U. S. 801: "long-term imprisonment could be so disproportionate to the offense as to fall within the inhibition" (p. 237). Cf. *McDonald* v. *Commonwealth*, 173 Mass. 322, 328; 53 N. E. 874, 875.

Here, of course, we do not have any question of excessive length of imprisonment, or of punishment inflicting physical pain. But if loss of nationality be considered as punishment then, we submit, by the standards above laid down, it violates the Constitution.

For under this "punishment" petitioner would be subject to the many disabilities imposed by state legislatures on aliens (see Konvitz, The Alien and Asiatic in American Law; the Expatriation Act of 1954, 64 Yale L. J. 1164 at 1167 and 1189, and authorities cited). But the most significant aspect of this case, which distinguishes it from all

the other cases which this Court has heretofore considered, is that petitioner would, if the decision below stands, become a stateless person. And, while we have become accustomed to the stateless status of refugees from foreign tyranny and terror, it is something new in our life to consider the possibility of a stateless native born American. We may remember Edward Everett Hale's moving story of The Man Without a Country, doomed for one youthful error to wander the seas, or the troubled saga of the contemporary real character, Ignatz Mezei (*Shaughnessy* v. *United States*, 345 U. S. 206).

A further consequence of the holding below is that petitioner might be subject to deportation, for when he returned to the United States as an "alien," without passport and without visa, after his release by the army from confinement in Algeria (see R. 10) his entry into the United States could be considered an illegal one. As an "alien" he would have to register periodically (8 U. S. C. 1301-1306) and, if ordered deported, be subject to the supervision and penalties of Section 1252.

Pertinent are the observations of Professor Roche of Haverford, in The Loss of American Nationality, 99 University of Pennsylvania Law Review 25, at p. 70:

> "The legitimate end of an expatriation statute is to eliminate international problems of nationality by establishing standards by which it can be determined when an American has transferred his allegiance to another sovereign. Ideally speaking, an American should not be deprived of his citizenship until he has obtained that of some foreign state. At the very least, expatriation provisions should not be employed in the gratuitous creation of stateless persons by adding loss of citizenship to the other penalties for crimes against the sovereign."

See also 64 Yale Law J. 1164, 1187-1199 and authorities cited.

In other words, having in mind the absence of specific provision in the Constitution for loss of nationality, the requirements of due process of law as guaranteed by the Fifth Amendment and the prohibition against cruel and unusual punishment contained in the Eighth Amendment, Congress may not declare that nationality can be lost except on the basis of some action voluntarily taken which has direct relationship to the acquisition of another nationality.

Statelessness, condemned by all authorities on international law and the United Nations Universal Declaration of Human Rights (Art. 15, U. N. Doc. A/810) should not be approved by this Court.

IV.

The statute should be construed so as to avoid doubt about its constitutionality.

If the statute is limited to desertion to the enemy, then it has no application to the case at bar and the serious constitutional issues here presented need not be considered. Whenever possible this has been done by this Court. *United States* v. *Rumely*, 345 U. S. 41; *Peters* v. *Hobby*, 349 U. S. 331. See, generally, Note, Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions, 53 Col. L. Rev. 633 (1953).

The court below rejected the construction of the present law here suggested on two grounds: (1) because of its "escape" clause (R. 11); (2) because of Section 1483 (a) (R. 12).

As to the first, we note only that there is no reason to suppose that a deserter to the enemy might not regret his action and, when the circumstances justified it, be absolved and permitted to reenlist and so regain his citizenship. As to the second, the contention is that the reference to acts performed within the United States precludes the possi-

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* Formerly Section 803(a).

bility that the desertion must be to an enemy. But there is no inherent incapacity in performing the act of desertion to the enemy within the United States (especially as the section includes also "its outlying possessions"). That would, of course, be easy were the enemy Mexico or Canada or if an enemy had obtained a foothold in our territory. And, of course, that is just what happened in 1942 when the Japanese occupied Guam and other islands. Finally, any act which began in the United States, as flight by ship or plane, would constitute desertion "while within the United States".

We submit that none of the arguments advanced against the suggested construction have validity.

CONCLUSION

The voice of Cicero coming down over 2,000 years reminds us that, during the period of Rome's greatness, Roman citizenship could be lost only by the acquisition of citizenship elsewhere. In *pro Caecina* he said he wanted "to bring it home to everybody that citizenship has never been and can never be taken away from any man".*

The statute should be held unconstitutional or not applicable. In either event the judgment should be reversed and judgment entered declaring that petitioner remains an American national.

Respectfully submitted,

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of Counsel.

* Loeb Classical Library translation of Orations (1927), pp. 195-201, particularly par. XXXV, p. 201.

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Supreme Court of the United States

October Term, 1956

No. ~~710~~ 76

ALBERT L. TROP,
Petitioner,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE.

PETITIONER'S REPLY BRIEF

1. The government in its Brief (p. 5, note 3) chides us for our references to the character of the technical desertion here involved. These references are no "indirect reargument" of the court martial conviction, but merely an exposition of the extent to which denationalization has been carried in the case at bar. Surely it is appropriate to point out the extreme scope of a statute when considering its constitutionality, especially when that is not hypothetical.

The statement (*id.*) that petitioner was "apprehended" after "reaching" Moknes (which on the maps is spelled Meknes) is in conflict with the record. Lt. Derr, to whom petitioner and his companion surrendered, testified (R. 4) that he saw the two men while going from Meknes to Rabat (*i. e.*, in the direction of Casablanca where the escape took place, R. 8). And Sergeant Cochran said (R. 4) that at the time the men were walking toward Rabat. Thus petitioner had reversed his steps and was, as he himself said (R. 4) returning to the stockade. While the government

(Brief, pp. 5, 6, note 3) stresses the circumstance that petitioner had said (R. 4) that this return was motivated by hunger and cold, it fails to note that he had also explained his escape as motivated by a hope that he could rejoin his unit in Italy. Even if this could be considered a desertion covered by the Articles of War on the theory that escape from confinement was an attempt to avoid "hazardous duty" or to shirk "important service", it manifests no lack of allegiance to the United States. And that must be the criterion here.

2. The government appears (Brief, p. 5) to concede that allegiance is the determining factor in relation to nationality. But it makes the remarkable argument that acquisition of another nationality, as in *Mackenzie* and *Savorgnan*, has less impact on allegiance than desertion in wartime. That misconceives entirely the basis for the relation between allegiance and nationality. As Professor Zeballos said in the excerpt quoted in our Main Brief (p. 13), that relation exists because of international considerations. Where these are present legislation regulating the situation is permissible so as to avoid international complications. That is the basis of the rulings in all the cases which, until now, have sustained Congressional power. But where international considerations are absent there is no such power.

The question is not whether an individual is injuring his country (Govt. Brief, p. 5) but whether the act involves an indication of allegiance elsewhere. For injuries to the country Congress has provided punishment, here imposable by court martial—in an appropriate case even by death (Articles of War 58, in 1944, 10 U. S. C. 1530, now 10 U. S. C. 885).

3. The government, in its constitutional argument in *Perez* (Govt. Brief in No. 572, pp. 13-49) deals with a number of considerations not applicable to our case. For instance (p. 13) it states that "petitioners" (presumably

including Trop) take the view that Congress may not regulate nationality except to implement a citizen's desire to give up his American citizenship. That is not our position, as our Main Brief makes clear (pp. 15, 16). We there recognized that nationality may be lost despite lack of intention to do so—but only if the acts relied on have direct relation to the acquisition of another nationality. We shall, therefore, ignore as not here relevant the government's discussion at pp. 14-29.

While the government concedes, as it must, that in all the cases in this Court and most of those elsewhere the issue has involved possible international complications, it seeks (p. 33) to extend the area of Congressional power merely because Congress has attempted to do so. It suggests (p. 34) as a generalization that nationality may be lost by any act that is closely related to allegiance. We believe the formulation in our Main Brief (p. 13) more accurately describes the extent of Congressional power: that nationality can be regulated "only where international considerations come into question".

The comment (pp. 36, 37) with respect to the possibility of deportation is not, with respect to petitioner here, academic. For, as pointed out in our Main Brief (p. 21), he returned to the United States after the event which it is claimed has denationalized him.

Finally the Government (p. 49) deals briefly with the particular subsection under review and argues that desertion is a repudiation of an obligation of citizenship so serious as to justify loss of nationality. While it cannot be disputed that desertion is a serious offense, we submit that its relation with nationality, absent contact with the enemy, is too slight to justify the legislation. Moreover, we are here concerned with loss of nationality under circumstances not permitting any inference that there was desertion as popularly conceived—that is, an attempt to abandon the service.

4. One further thought. Implicit in the government's position is the recognition that the occurrence which results in loss of nationality must be one voluntarily undertaken (Perez brief, p. 26). Can it be said that this condition exists here? For there are two occurrences which must exist here: desertion and dishonorable discharge based on court martial conviction. However much it may be argued that the desertion was a voluntary act, surely no one could contend that the dishonorable discharge was. Consequently the impact of the desertion on loss of nationality did not depend on the voluntary act of petitioner, but resulted wholly from action taken by others. The imputation of consent to loss of nationality which has been read into the mind of the citizen in most of the cases dealing with the subject cannot be made here.

Respectfully submitted,

Osmond K. Fraenkel,
Counsel for Petitioner.

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October Term, 1957

No. 70

ALBERT L. TROP,

Petitioner,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE,

Defendants-Appellees.

SUPPLEMENTAL BRIEF FOR PETITIONER

(On Reargument)

Subsequent to the argument before this Court this case was heard in the finals of the Yale Law School moot court competition. The students [1] who there presented petitioner's case advanced a theory of statutory construction which had not occurred to the undersigned. It was received with respect by the "bench" [2] before which the moot case was argued, and merits consideration by this Court.

It will be recalled that the statute [Nationality Act of 1940, Section 401(g), quoted in full at page 2 of petitioner's original brief] provides for loss of nationality by reason of desertion in time of war and court martial conviction "thereof" and dishonorable discharge "as the result of such conviction"—*i.e.*, conviction for desertion.

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[1] Barry Sidman, Thomas Cecil Wray, Jr. and Richard Reisman.

[2] Mr. Justice Reed, formerly of this Court, Judges Bazelon and Soboloff of Courts of Appeals; Dean Griswold of Harvard, and Hon. Harrison Tweed, Chairman of the New York Temporary Commission on Courts.

In the case at bar petitioner was charged with three offenses committed in 1944 (R. 8, 9). The first involved two escapes, in violation of Article 69 of the Articles of War; the second, absence from duty on the occasion of the first escape, in violation of Article 61; the third, desertion following the second escape, in violation of Article 58. The court martial made a single finding of guilt with respect to all three of the charges (R. 9). On this finding it imposed a single, though composite sentence: dishonorable discharge, forfeiture of pay and three years hard labor (R. 9).

On this record, how can it be said that the dishonorable discharge was, as the statute requires, imposed "as the result" of the conviction for desertion? There is no way of determining to what extent the convictions for the two escapes or the absence from duty contributed to the result. In view of the fact that the desertion here charged lasted for one day only, that there was no contact with the enemy or attempt to make such contact, and that petitioner voluntarily surrendered while walking *back* toward Casablanca (see reply brief, p. 1, in No. 710, Oct. 1956 Term), it is reasonable to suppose that the court martial would not have imposed the severe penalty of dishonorable discharge with apparent loss of nationality if petitioner had been guilty of this offense alone.

Since the penalty of dishonorable discharge could have been imposed solely by reason of the conviction on either of the other convictions,[3] this Court must speculate to determine whether or not the conviction for the very minor desertion formed any basis for the dishonorable discharge. Loss of nationality should not be permitted to rest on such an uncertain basis.

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[3] Under the 1928 Manual for Courts Martial (which was in force in 1944) a dishonorable discharge might be imposed on conviction for escape in violation of Article 69 (see p. 98). While no such punishment could be inflicted for conviction under Article 61 (for absence without leave) under the tables contained in the 1928 Manual (see p. 97) all limitations in respect to that offense had been lifted in 1942 (7 F. R. 9221).

Otherwise stated, the argument is that where one or more factors contribute to a given result it cannot be said that the event "resulted" from any particular factor. It is elementary, for instance, that a jury's verdict will not be allowed to stand where it might have rested on more than one set of circumstances if one of the sets was improperly submitted to it (*Stromberg* v. *California*, 283 U. S. 359; *Bollenbach* v. *United States*, 326 U. S. 607; cf. *Yates* v. *United States*, 354 U. S. 298). That is so because it cannot be fairly said that the verdict was the "result" of any particular set of circumstances. So here, it cannot fairly be said that the sentence of dishonorable discharge was the "result" of the desertion conviction rather than of the conviction for the two escapes or for the absence from duty. As a conviction "ought not to rest on an equivocal direction to the jury on a basic issue",[4] so here loss of nationality should not result from an equivocal sentence by a court martial.

Respectfully submitted,

OSMOND K. FRAENKEL,
Counsel for Petitioner.

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[4] *Bollenbach* v. *United States*, 326 U. S. 607, 613; *Yates* v. *United States*, 354 U. S. 298, 327.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

ALBERT L. TROP, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE OF THE UNITED STATES, AND UNITED STATES DEPARTMENT OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
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Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 710

ALBERT L. TROP, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE OF THE UNITED STATES, AND UNITED STATES DEPARTMENT OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In 1944, in Casablanca, French Morocco, petitioner, a native-born citizen, was convicted by court-martial of deserting the United States military forces in time of war, and as a result thereof was dishonorably discharged from the service. In October 1952, his application for a passport was refused on the ground that he had lost his United States nationality under Section 401(g) of the Nationality Act of 1940 which specified as a ground for loss of nationality "deserting the mili-

tary, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged * * *."

In December 1955, petitioner brought this suit for a declaratory judgment to establish his citizenship. After both parties had moved for summary judgment, the District Court granted judgment in favor of the government (Pet. 15). The Court of Appeals affirmed, Judge Clark dissenting (Pet. 16-19).

In this Court petitioner attacks the constitutionality of Section 401(g). The issue is very similar to the question of the validity of Section 401(j), providing for loss of nationality by remaining out of the country to avoid military service, now before this Court in *Perez* v. *Brownell*, No. 572, this Term. The decision in the *Perez* case will have great bearing, and may indeed be controlling, on the issue here raised. For that reason the government does not oppose the granting of the petition for a writ of certiorari in this case.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

FEBRUARY 1957.

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In the Supreme Court of the United States

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ALBERT L. TROP, PETITIONER

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statute involved	2
Statement	3
Argument:	
I. Congress has the constitutional power to provide that United States nationality is lost by one convicted of desertion in wartime	4
II. The statute need not, and should not, be read as relating only to desertion to the enemy	6
Conclusion	10

CITATIONS

Cases:	
Mackenzie v. *Hare*, 239 U. S. 299	5
Perez v. *Brownell*, No. 572, this Term	3, 4, 10
Savorgnan v. *United States*, 338 U. S. 491	5
Statutes and Articles of War:	
Immigration and Nationality Act of 1952, Section 349 (a), 66 Stat. 267, 8 U. S. C. 1481 (a)	2
Nationality Act of 1940, Sec. 401 (g), 54 Stat. 1169	9
Nationality Act of 1940, 54 Stat. 1137, as amended by the Act of January 20, 1944, 58 Stat. 4:	
Sec. 401 (g)	2, 9
Sec. 401 (h)	8
Sec. 401 (j)	9
Articles of War:	
Article 28 (41 Stat. 792; 10 U. S. C. (1946 ed.) 1499)	7
Article 58 (41 Stat. 800; 10 U. S. C. (1946 ed.) 1530)	6
Miscellaneous:	
89 Cong. Rec. 3239–3245, 7107–7108, 10134–10135, 10974–10976	9
90 Cong. Rec. 123, 129	9
H. Rept. No. 302, 78th Cong., 1st Sess	9
S. Rept. No. 382, 78th Cong., 1st Sess	9
Winthrop, *Military Law and Precedents* (2d ed. 1920), 637–649	7

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JOHN FOSTER DULLES, AS SECRETARY OF STATE OF THE UNITED STATES, AND UNITED STATES DEPARTMENT OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (R. 10–14) are reported at 239 F. 2d 527.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1956 (R. 14). The petition for a writ of certiorari was filed on January 24, 1957, and was granted on March 4, 1957 (R. 15). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether Congress has the constitutional power to provide, as it did in Section 401 (g) of the Nationality Act of 1940, for the expatriation of a native-born

citizen who was convicted of deserting the military forces of the United States in time of war.

STATUTE INVOLVED

Section 401 of the Nationality Act of 1940, 54 Stat. 1137, as amended by the Act of January 20, 1944 (58 Stat. 4), provided in pertinent part: [1]

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: *Provided,* That notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous Acts by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to [January 20, 1944], shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom * * *.
>
> * * * * *

[1] The provision is now substantially incorporated in Section 349 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 267, 8 U. S. C. 1481 (a).

The full text of Section 401, including the other provisions for loss of nationality by native-born nationals, is set forth in the Appendix to the government's brief in *Perez* v. *Brownell*, No. 572, this Term, at pp. 59–61.

STATEMENT

Petitioner seeks reversal of the judgment of the Court of Appeals for the Second Circuit (R. 14) affirming the judgment of the District Court for the Eastern District of New York (R. 5–6) which had dismissed petitioner's action for a declaration that he had not lost his citizenship. The pertinent facts may be summarized as follows:

Before a general court-martial convened at Casablanca, French Morocco, on June 7, 1944, petitioner, then a private in the United States Army, was found guilty of two escapes, on May 9 and 22, 1944, respectively, of an absence on May 9, 1944, and of desertion on May 22, 1944 (R. 8–9). He was sentenced, *inter alia,* to be dishonorably discharged from the service and to be confined at hard labor for three years (R. 9). The dishonorable discharge was to be suspended until his release from confinement (R. 9–10).

Petitioner later resumed residence in the United States[2] and applied for a passport in 1952 (R. 2). The State Department denied the passport on the ground that he had lost United States nationality by his conviction of desertion (together with the putting into effect of his dishonorable discharge) (R. 2, 5).

[2] The manner or date of his return, whether as a military prisoner or otherwise, does not appear in the record. He now resides in New York (R. 2).

On December 29, 1955, petitioner commenced the instant proceeding for a declaration of citizenship (R. 1). Both parties moved for summary judgment (R. 5). In support of his motion for summary judgment, petitioner filed an affidavit alleging that, in deserting, he did not intend to expatriate himself or become a national of any other country, and that he did not attempt to contact any enemy of the United States or any foreign country (R. 2–3). The District Court granted summary judgment for the respondent (R. 5–6).

The majority below (per L. Hand, J.), affirming the District Court's holding of loss of nationality, found no sufficient doubt of constitutionality "to resort to any but the natural meaning of the words" *i. e.*, that in time of war "desertion of any kind" results in expatriation (R. 11). The dissenting opinion of Chief Judge Clark was of the view that the statute was unconstitutional as constituting cruel and unusual punishment for desertion (R. 13).

ARGUMENT

I

CONGRESS HAS THE CONSTITUTIONAL POWER TO PROVIDE THAT UNITED STATES NATIONALITY IS LOST BY ONE CONVICTED OF DESERTION IN WARTIME

Petitioner's basic contention (Pet. Br. 6–22) is that the designation of desertion from the armed forces in wartime as a ground for loss of nationality is beyond the constitutional powers of Congress. This issue is discussed in detail in the Government's brief in *Perez* v. *Brownell*, No. 572, this Term, together with the

validity of other provisions for loss of nationality under companion subsections of Section 401, *i. e.*, remaining in a foreign country to evade military service, voting in a foreign country, and serving in the armed forces of a foreign country of which one is also a national. The Court is respectfully referred to that discussion for the Government's argument on the question of constitutionality.

Congress provided in 1940, as it had in 1865, that loss of nationality should result from desertion in wartime because that act is a most serious rejection of allegiance at a time of crisis when military service is the fundamental obligation of allegiance. Desertion in wartime is more related to the basic obligations of allegiance than the conduct involved in *Mackenzie* v. *Hare*, 239 U. S. 299, and *Savorgnan* v. *United States*, 338 U. S. 491, where the United States citizen sought merely to *add* a further, dual nationality to her American nationality. The nation's needs in avoiding "diplomatic embarrassment" arising from dual nationality (Pet. Br. 8) are not more urgent than the nation's need for defenders. One who seeks an *additional* nationality is not more truly injuring his American nationality and his country than one who, in time of war, deserts the armed forces of that country.[3]

[3] Petitioner's indirect reargument of his conviction of desertion, by five times referring to the "one day" aspect of the desertion (Pet. Br. 2, 4–5, 15, 19), misconceives the seriousness of his conduct, as well as the inappropriateness of the issue here. Petitioner did not embark on a mere "one day" escapade; the shortness of his desertion from Casablanca resulted from the fact that, after reaching Moknes, French Morocco, he was "apprehended" (R. 9). His emphasis below and here upon his lack of resistance to return (R. 4; Pet. Br. 3–4), is not indicative of a contrite change of heart but

And the fact that petitioner may now be stateless does not detract from the power of Congress. See our brief in No. 572, at pp. 35–36.[4]

II

THE STATUTE NEED NOT, AND SHOULD NOT, BE READ AS RELATING ONLY TO DESERTION TO THE ENEMY

Petitioner's suggestion that, in order to avoid a constitutional question, the statute should be construed as relating only to desertion to the enemy (Pet. Br. 22–23) is based on the premise, shown in our brief in No. 572 to be erroneous, that the constitutional power of Congress to designate the conduct which will result in loss of nationality is limited to those situations where the citizen deliberately chooses another nationality, or, at most, to situations where his conduct evinces the acceptance of another nationality. If, as discussed in our *Perez* brief, Congress may condition loss of nationality on acts which adversely affect the cardinal elements of allegiance to the United States,

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was due to the consideration that "we were on foot and we were getting cold and hungry" (R. 4). The members of the court-martial were in a position, by reason of the specifications at the trial (R. 8–9), to distinguish between petitioner's offenses of absence without leave and the vital offense of desertion in wartime—an offense considered seriously enough by the Congress to permit a death penalty (41 Stat. 800, 10 U. S. C. (1946 ed.) 1530). It is significant that the military authorities did not see fit—as they did in many other cases—to suspend petitioner's dishonorable discharge and to restore him to duty.

[4] In our brief in No. 572, at p. 35, footnote 23, we referred to an *amicus curiae* brief of the American Jewish Congress which was to deal with statelessness. The parties gave consent to such a brief, but it was not filed (because, we understand, of considerations of time).

there is no reason on constitutional grounds to construe the statute other than in accord with its plain terms. And on the basis of those terms the statute cannot fairly be read as relating only to desertion to the enemy.

In military law, the offense of desertion manifestly does not require desertion to the enemy. It was defined in the Articles of War in effect at the time of petitioner's conviction as follows (41 Stat. 792; 10 U. S. C. (1946 ed.) 1499):

> Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter.

And note the conspicuous absence of any requirement of going over to the enemy, in the extensive discussion of desertion by Winthrop, *Military Law and Precedents* (2d ed. 1920), 637–649.

There is no indication that the definition of desertion under the Nationality Act of 1940 was to be different in any respect from the military offense. Indeed, the requirement that, for loss of nationality, the offender had to be "convicted thereof by court martial" in itself suggests that the military offense of desertion in wartime is the determinant of loss of nationality. Moreover, as the majority opinion below points out (R. 11), the proviso for the possible restoration of nationality by restoration to duty in the armed forces (*supra*, p. 2), is a very persuasive indication that the statute was to apply to desertion without going over to the enemy. One who deserts to the enemy is hardly likely to come back to our forces or to be

restored to duty. In addition, a voluntary desertion to the enemy in wartime would rarely, if ever, be anything short of treason, in itself a basis for loss of nationality without possibility of restoration (see Section 401 (h) of the Nationality Act of 1940, 54 Stat. 1137, Appendix to the Government's brief in No. 572, at p. 61). If petitioner were correct, Section 401 (g) would be unnecessary since desertions to the enemy would be covered by subsection (h), the treason provision. Congress must have envisaged that the instant subsection relating to deserters—with its provision for restoration—would be applicable to those who had simply deserted in wartime without going over to the enemy.

This conclusion is fortified, as also noted by Judge Hand below (R. 12), by the fact that loss of nationality because of a conviction for desertion—in contradistinction to most of the acts of expatriation specified in Section 401 of the 1940 Act—need not occur outside the United States or be followed by residence outside the United States. Under the specific provisions of the Act, expatriation may occur for desertion within the United States. Certainly, in 1940 there was little anticipation by the legislators that desertion would be to the enemy within the United States, despite the ingenious possibilities for such desertion to the enemy within the United States upon which petitioner speculates (Pet. Br. 23). Congress was obviously thinking of desertion in the traditional military sense, and not in the special sense which petitioner reads into Section 401 (g).

Finally, the legislative history of the provision proves conclusively that this is so. As originally enacted in 1940 (54 Stat. 1169), Section 401 (g) simply read:

> (g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; * * *.

The Act of January 20, 1944, 58 Stat. 4, amended Section 401 (g) to provide for restoration and to read as it is set forth *supra*, p. 2. It is perfectly clear that this amendment of January 20, 1944, was expressly designed to help those many servicemen who had been convicted of desertion in World War II (within the United States and abroad), but who had returned or been apprehended, had served their sentences, and had then been restored to duty under the general military policy then prevailing. See H. Rept. No. 302, 78th Cong., 1st Sess.; S. Rept. No. 382, 78th Cong., 1st Sess.; 89 Cong. Rec. 3239–3245, 7107–7108, 10134–10135, 10974–10976; 90 Cong. Rec. 123, 129.[5]

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[5] The legislative history of the 1944 amendment to Section 401 (g) also indicates that—just as with subsection (j) (draft-evasion) (see our brief in No. 572, pp. 43, 44–45, 53–55)—subsection (g) was considered by Congress to be the direct successor to the 1865 statute discussed in our brief in No. 572 at pp. 41–44.

CONCLUSION

For these reasons, and those set forth in the Government's brief in *Perez* v. *Brownell*, No. 572, this Term, it is respectfully submitted that the judgment of the court below should be affirmed.

J. LEE RANKIN,
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Assistant to the Solicitor General.
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